Supreme Court of the United States

OCTOBER TERM, 1902.

No. 149.

JOHN D. HOOKER AND A. E. POMEROY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF LOS ANGELES, DEFENDANT IN ERROR.

PETITION FOR REHEARING.

Plaintiffs in error respectfully ask the court for a rehearing in this cause, and show to the court that it was submitted to the court on the 23d day of January, 1903, and on the 23d day of February, 1903, the writ was dismissed for want of jurisdiction.

The plaintiffs in error contended that the court had jurisdiction upon several different grounds, but upon this petition we shall refer to one only.

As shown in the opinion filed herein, plaintiffs in error claimed title to the land in controversy under certain Mexican and Spanish grants, confirmed by the United

States, upon which patents had issued; and they alleged in the answer and amendments thereto that by operation of these patents there passed to the patentees, as part and parcel of the lands patented, all the rights of riparian owners in the waters of the Los Angeles river.

It does clearly appear from the opinion of the supreme court of California that the decision was against this right, that court holding not only that the rights of plaintiffs in error in the waters of the stream were subordinate to a prior and paramount right of the city of Los Angeles, as the successor of a Mexican pueblo, to all the waters of the stream to the extent of the needs of the pueblo, but also that this pueblo right extended beyond the pueblo limits and to all territory which had been, or that might at any time hereafter be, incorporated within the city, which was, to all practical intents, a determination that plaintiffs in error had no rights in the waters of the Los Angeles river at all.

The decision of this court against the jurisdiction upon these facts seems to rest upon the ground stated on page 3 of the opinion, which is as follows:

"Obviously, the question as to the title or right of plaintiffs in error in the land, and *whatever pertained thereto*, was one of *State law and of general public law*, on which the decision of the State court was final.

"San Francisco *vs.* Scott, 111 U. S., 768.

"Powder Works *vs.* Davis, 151 U. S., 389."

(The italics are not in the opinion.)

We respectfully submit that these cases, if they go to the full extent here stated, are not consistent with many other cases wherein it has been held that the decisions of the

State courts on questions of general public law are not conclusive on this court.

And in what respect or to what extent is the question of what title passed under the patent of the United States in the land and whatever appertained thereto one of State law?

We submit that this is the question presented here. The decisions we have cited show that no title had passed to the pueblo until the patent of the United States issued; and while it is no doubt true the patent issued to the city passed whatever, under the laws of Mexico, pertained to a pueblo grant, and the rights passed by the patent to the land embraced in the grants of the various ranchos referred to in the answer were subject to whatever paramount or prior rights existed in others, and equally true that none of these patents were conclusive against third persons; and admitting, further, that each was a third person with respect to the other, still the question is, what did pass under the United States patents? If this is a matter of State law, what right can be asserted under a patent of the United States that might not equally be denied by the State court without redress here?

It is respectfully submitted that the power of the State, either by legislative enactment or judicial decision, to limit the operation of a United States patent is not only inconsistent with many decisions of this court and of the State courts as well, but contrary to the assumed power of Congress over the subject in various statutes which have never been questioned, so far as we are advised.

Strip this case of the precedent Mexican grants; consider these patents as though they were instruments by which the title of the United States in lands belonging to the United

States was transferred to private individuals, and what effect could State laws or State court decisions have upon the title thus passed and the incidents or legal effect thereof?

While the lands were public lands of the United States, could any State deprive them of any part of the land or anything that pertained thereto?

We shall not repeat here what we have already set forth in the brief, but refer the court to the opening brief, pages 72–76 and 119–125.

The acts of Congress wherein it has assumed to grant the right to the use of the water by appropriation, and thus separate or dissociate the water from the lands, are the assertion of ownership of the waters of innavigable streams flowing through the public lands, and the right to dispose of them; and where rights have not been acquired under these acts, the rights of riparian ownership shall pass with the lands. Congress has also, in providing for the disposition of public lands, almost invariably reserved the mineral lands, except in those acts relating directly to the disposition of the mineral lands.

Now, the claim was at one time seriously put forth that the State, as the sovereign, was entitled to mines of gold and silver within its limits. Would a decision of a State could upholding such claim conclude this court upon the question of the rights of the United States in the mines found in public lands? Or could any act of a State legislature declaring such a rule deprive the United States of its rights to such mines?

Congress have in the acts providing for the disposition of mineral lands declared that a patent for a placer claim shall not pass title to any lode then known to exist therein, unless

the application for the patent includes such known lode, and have thus assumed the power to declare what shall be the effect of a patent of the United States, and what title shall pass in the lands embraced in the patent and in whatever appertained thereto. Can any State action give a different effect to the patent issued under the act?

Innumerable acts have given to railroad and other companies rights of way over public lands, and the right to excavate the soil and to take timber from the public lands for purposes of public improvements, and, in short, Congress have assumed that the title of the United States in the lands belonging to them had attached thereto all the various incidents which pertain to lands and carried with it all that the common-law definition of the term embraces within its meaning; and if it has such ownership, its patent transfers the rights of the United States to the patentee.

Do the Mexican grants make any difference in these principles thus assumed in acts of Congress, approved by the Federal courts and acquiesced in by the State courts? The patents of the United States, whether a quitclaim, pure and simple, as said in some cases, or a grant of all the right, title, and interest of the United States, as said in others, does nevertheless pass whatever title belonged to the United States in these lands, and that was the whole title; and even if charged with a trust to convey by the patent whatever in equity the Mexican government ought to have conveyed, the question is, we again submit, what did the patents pass to the patentees? and the decisions of the State court upon that question should not be conclusive.

Let us suppose, for the sake of illustration, that there was

no such paramount right in the Spanish or Mexican pueblo, or, if any, it did not extend beyond the pueblo limits; then the patent of the United States did not pass any paramount right to the city in the one case or pass any extending to any other than pueblo lands in the other. And the patents to the ranchos, under which plaintiffs derive title, did pass the rights of a riparian owner in one case and in the other subordinate only to the use of the pueblo lands, and in either event plaintiffs in error have been denied the rights set up and claimed under the patents of the United States.

We call attention of the court to the case of Mobile Transportation Company, plaintiff in error, *vs.* City of Mobile, No. 62, October term, 1902, decided by this court January 5, 1903, published in advance sheets of the opinions of this court, No. 5, dated February 1, 1903.

That case went up on a writ of error to the supreme court of Alabama.

His honor Mr. Justice Brown, delivering the opinion of the court, after stating the claim of the defendant under a Spanish grant and a patent of the United States, said:

"Motion was made to dismiss this writ of error for the want of a Federal question, but in view of the fact that defendant's title depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 between the United States and the King of Spain * * * and a patent of the United States—dated December 28, 1836—in alleged confirmation of such claim, we do not see how such motion can be sustained, unless upon the theory that the Federal questions so raised are frivolous and undeserving of further notice. We are of opinion that they cannot be so considered, and the motion to dismiss must therefore be denied." (Advance sheets No. 5, pp. 171, 172.)

It is submitted that the same ground of jurisdiction exists here. In that case it is true the court held that whether a grant of the United States to land lying on a navigable stream within the limits of a State extends to high or to low water mark or to the middle thread of the stream was not a Federal but a local question, and many cases were cited; and it is submitted that that is the extent to which the Federal courts have gone in holding themselves concluded by any State action concerning the effect of a United States patent.

But this rule stands upon a different reason from that which relates to innavigable streams flowing through the public lands. As to navigable streams, the State is the owner of the lands lying between high and low water mark, and whatever it may prescribe, regulating the rights of others within those limits, whether those rights are claimed under a patent from the United States or otherwise, it is dealing with its own and not with property of the United States.

With these suggestions we respectfully ask a reconsideration of the question of the jurisdiction of this court upon the ground here presented.

Respectfully submitted.

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